Nos. 91-744 and 91-902

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act:

   a. 18 Pa. Cons. Stat. Ann. § 3203 (definition of medical emergency)

   b. 18 Pa. Cons. Stat. Ann. § 3205 (informed consent)

   c. 18 Pa. Cons. Stat. Ann. § 3206 (parental consent)

   d. 18 Pa. Cons. Stat. Ann. §§ 3207, 3214 (reporting requirements)?

2. Did the Court of Appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (spousal notice) unconstitutional?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this brief.*

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* By agreement of the parties, Planned Parenthood, et al., petitioners on No. 91-744 and cross-respondents on No. 91-902, will be referred to as "petitioners" and will address all the issues in the consolidated cases in their opening and reply briefs. Robert P. Casey, et al., respondents on No. 91-744 and cross-petitioners on No. 91-902, will be referred to as "respondents" and will address all the issues in their responsive brief.

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IN THE

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Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Petitioners and Cross-Respondents,

—v.—

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST D. PREATE, JR., personally and in their official capacities,

Respondents and Cross-Petitioners.

BRIEF FOR PETITIONERS AND CROSS-RESPONDENTS

OPINIONS BELOW

The opinion of the district court, issued on August 23, 1990, is reported at 744 F. Supp. 1323 (E.D. Pa. 1990). 104a-288a. The decision of the panel of the United States Court of Appeals for the Third Circuit, issued on October 21, 1991, is reported at 947 F.2d 682 (3d Cir. 1991). 1a-103a.[1]

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1 The opinions and statutes involved are reprinted in the Appendix to the Petition for a Writ of Certiorari in Case No. 91-744. Citations to this Appendix are made to the page number therein as "____a." Citations to the Joint Appendix are made to the page number therein as "J.A.____."

JURISDICTION

The final judgment of the court of appeals was entered on October 21, 1991. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1) (1988), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The petition and cross-petition for certiorari were granted on January 21, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Ann. §§ 3203 (definition of medical emergency), 3205, 3206, 3207(b), 3208, 3209, 3214(a) and (f) (1983 & Supp. 1991) are set forth in the Appendix to the Petition for Certiorari. 289a-304a.

The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. HISTORY OF THE LEGISLATION.

In 1988 and again in 1989, following this Court's ruling in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), the Pennsylvania legislature amended the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3203-3220 (1983 & Supp. 1991), imposing a series of highly intrusive and burdensome restrictions on women seeking abortion services. In large part, the amendments reenacted the statutory provisions of the 1982 Act, which this Court held unconstitutional in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). *See also City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).[2]

Like the provisions of the 1982 Act, the amendments mandate that a physician provide a woman seeking an abortion with a prescribed litany of state-sponsored information discouraging abortion and that the physician delay the procedure for at least 24 hours after she receives this information. 18 Pa. Cons. Stat. Ann. §§ 3205, 3208; 289a-292a, 298a-300a. The amendments also require the collection of detailed, particularized information—some of which must be publicly disclosed—for every abortion performed. 18 Pa. Cons. Stat. Ann. §§ 3207(b), 3214(a) and (f); 298a, 302a-304a.

The amendments also mandate that married women notify their husbands of their abortion decisions, 18 Pa. Cons. Stat. Ann. § 3209; 300a-302a,[3] and that women under the age of eighteen obtain either the "informed consent" of one parent or a court order waiving the requirement. 18 Pa. Cons. Stat. Ann. § 3206; 292a-297a.[4] While compliance with §§ 3205, 3206, and 3209, and other provisions of the Act not before this Court, is exempted where there is a medical emergency,

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2 Following *Akron*, the Commonwealth of Pennsylvania conceded the invalidity of the 24-hour mandatory delay and physician-only counseling provisions of the Act. *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984). Thus, the constitutionality of those provisions was not before this Court in *Thornburgh*.

3 The 1974 Abortion Control Act, an earlier version of the 1982 Act, required a married woman to obtain the consent of her husband. It was found unconstitutional in *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554, 564-66 (E.D. Pa. 1975) (three-judge court), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976). In 1987, the legislature then passed a "paternal" notification provision. In vetoing this measure, respondent Casey noted that "a state cannot delegate to any third-party—even a husband—a power that the state cannot exercise itself." J.A. 595.

4 The 1974 and 1982 Acts also contained parental consent requirements that were found constitutionally deficient. *See Fitzpatrick*, 401 F. Supp. at 566-68; *American College of Obstetricians & Gynecologists v. Thornburgh*, 656 F. Supp. 879, 887-90 (E.D. Pa. 1987).

the Act's definition of medical emergency is extremely narrow. 18 Pa. Cons. Stat. Ann. § 3203; 289a.

II. HISTORY OF THE LITIGATION.

Six years ago, this Court reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), and found that provisions of the 1982 Act, nearly identical to the amendments before this Court today, "wholly subordinate[d] constitutional privacy interests . . . in an effort to deter a woman from making a decision that . . . is hers to make." *Thornburgh*, 476 U.S. at 759. Relying principally on this Court's decisions in *Roe*, *Thornburgh*, and *Akron*, and following a three-day bench trial at which ten witnesses testified,[5] the district court issued its opinion and order on August 24, 1990, enjoining virtually all of the challenged provisions. 104a-288a.

The trial court's detailed findings of fact,[6] which demonstrate that the Act endangers women's lives and health, confirm the findings made by this Court in *Thornburgh* on a more limited factual record. The district court rejected the Commonwealth's argument that *Webster*, 492 U.S. at 517-20, and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), had overruled or modified the strict scrutiny standard of *Roe*, applied in both *Thornburgh* and *Akron*. 231a-233a. It found, however, that this Court's decision in *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) ("*Bellotti II*"), required it to judge the constitutionality of the "informed" parental consent requirement of § 3206 under the less protective "undue burden" standard. 248a. Nevertheless, based on the evidence, the district court found this provision invalid under this more deferential standard. 248a-252a. The Commonwealth appealed.

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5 In addition, the district court reviewed two sets of stipulated facts and the verifications and testimony of four witnesses from the preliminary injunction hearing. J.A. 608-21.

6 The district court carefully documented the record evidence supporting each of its 387 findings of fact, none of which was reversed on appeal. Given the complete absence of "an extraordinary reason" to examine the district court's findings, they must be accepted by this Court. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

On October 21, 1991, applying an incorrect interpretation of *Marks v. United States*, 430 U.S. 188 (1977), the Court of Appeals for the Third Circuit reversed in part and affirmed in part the district court's judgment, holding that *Roe*, *Akron*, and *Thornburgh* are no longer the law of the land and that women no longer enjoy a fundamental constitutional right to choose abortion. 30a. Rather, the court of appeals held that *Webster* and *Hodgson* established a new and less protective "undue burden" standard for reviewing the constitutionality of abortion restrictions, a standard first suggested in Justice O'Connor's dissenting opinions in *Akron*, 462 U.S. at 453, 461-64 (O'Connor, J., dissenting) and *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting). Rather than remanding the case for application of the new standard by the trier of fact, or for further factual development relevant to this new standard, the court of appeals largely ignored the record and upheld all challenged provisions except the husband notification requirement. These consolidated Petitions for Certiorari followed.

III. FACTS.

A. Husband Notification.

Except in extremely limited circumstances, § 3209 of the Act requires every married woman to notify her husband that she is about to undergo an abortion.[7] In the vast majority of marriages, wives discuss their abortion choice with their husbands and reach a decision only after serious dialogue. 193a. In many troubled and dysfunctional marriages, however, the Act forces a woman to involve even an abusive husband in her abortion decision, jeopardizing her own health and safety as well as that of her children.

Marital abuse is surprisingly common in the United States. As the district court found, "one of every two women will be

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7 The Commonwealth neither requires a husband to notify his wife about any medical procedures affecting his capacity to have children within marriage, nor requires a wife to notify her husband of other surgical procedures, including those that affect her capacity to become a mother. 199a.

battered at some time in their [sic] life." 195a. In addition to physical battering,[8] which often intensifies during pregnancy, 196a, some husbands resort to sexual abuse, including rape and sexual mutilation; psychological abuse, including verbal insults; and abuse of the children or other family members. 196a, 199a. In an attempt to control all aspects of their wives' lives, some husbands refuse to provide sufficient support to feed, clothe, and shelter the family, 199a; J.A. 213-14; or closely monitor their wives' whereabouts. J.A. 212-13, 229-30. The court of appeals found that "the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless," and includes:

> women who reasonably fear retaliatory psychological abuse; women who reasonably fear retaliatory physical or psychological abuse of their children; women who are separated following a failed marriage relationship and for whom renewal of contact may produce severe emotional distress; women whose husbands have serious health problems and who reasonably fear that notification will be health threatening; and women whose marriages are severely troubled and who reasonably fear that notice will precipitate the demise of the marital relationship.

70a. The dangerous and potentially deadly consequences of forced notification cannot be overstated. As Dr. Lenore Walker, a national expert on domestic violence, testified, requiring a battered woman to notify her husband is like "giving him a hammer to just beat her." J.A. 228. *See also* 201a.

Two of the exceptions to the husband notification requirement purport to relieve women of the devastating consequences of domestic violence caused by the mandatory

8 Bonnie Jean Dillon, a battered woman, testified at trial of "being thrown on the floor in the kitchen and being kicked around with his feet. I remember being drug [sic] from the back room of the office and thrown down the cellar steps while the secretaries were there. I can remember being thrown against the cellar door and smashing my face against the cellar door." J.A. 381.

notification. Section 3209(b)(3) provides that the mandatory notification does not apply where "[t]he pregnancy is a result of spousal sexual assault . . . which has been reported to a law enforcement agency." Section 3209(b)(4) provides for a waiver of notification where the woman reasonably believes that notifying her husband "is likely to result in the infliction of bodily injury upon her." 301a.

Neither of these exceptions provides any meaningful protection for battered women. Section 3209(b)(4)'s exception is expressly limited to situations where the woman fears "bodily injury" to herself. Thus, as the district court found, a married woman must notify her abusive husband of her decision to obtain an abortion even if he psychologically or economically coerces her or her children; punishes her children with physical violence or sexual abuse; threatens to publicize her decision to have an abortion; or threatens to retaliate against her in future child custody or divorce proceedings. 194a, 199a.

Moreover, § 3209(b)(3) applies only in cases where the pregnancy is the "result" of spousal sexual assault that has been reported to a law enforcement official. 18 Pa. Cons. Stat. Ann. § 3128(c). Consequently, the exception provides no assistance when the sexual abuse occurs after the woman becomes pregnant, when the sexual abuse does not result in pregnancy, or when the woman has not or cannot report the abuse. In some cases, rather than exempting the woman, it actually triggers notification, for once officials launch an investigation or file criminal charges, the husband will be notified.

Even where the exceptions apply, they are unlikely to be of any aid. Battering and sexually abusive husbands often threaten their wives with further violence if they break the shroud of secrecy that surrounds the battering. 197a.[9] Similarly, few survivors of marital rape will be able to report the

9 For example, when asked at trial why she had never told anyone about her husband's battering, even after it put her in the hospital five times, Ms. Dillon said, "I was afraid of how he would react if he found out that I was telling people about our secret, about what he was doing to me." J.A. 383.

rape to law enforcement officials. 198a. As Dr. Lenore Walker testified at trial, women "will rarely report to a law enforcement agency that they have been sexually abused." J.A. 230.[10] Other battered women deny their abuse as a survival strategy for coping with the pain, and will rarely, if ever, discuss their abuse with anyone. 200a-201a. As the district court found, the realistic fear of retaliation by the abuser, or the psychological condition caused by the abuse, will make battered women "unlikely to avail themselves of the exceptions to § 3209 . . . regardless of whether the section applies to them." 198a.

B. Biased Patient Counseling and Mandatory Delay.

Section 3205 of the Act requires that a woman give her voluntary and informed consent to the abortion procedure. 289a. But in a radical departure from accepted medical principles, § 3205 deems consent "informed" only when a physician provides the woman—on pain of criminal penalties and license suspension and revocation[11]—with state-approved information.[12] As the district court found, this information creates the impression that both the Commonwealth and the physician "disapprove[ ] of the woman's decision," *see* 179a,

10 For example, despite years of counseling following the break-up of her marriage, Ms. Dillon had never revealed the fact that she was a survivor of marital rape, until several days before her testimony, and only then after repeated questioning by counsel. J.A. 387.

11 The district court found "no other instance [in which] an informed consent regulation provide[s] for criminal penalties." 180a. The threat of criminal prosecution will deter physicians from performing abortions because medical malpractice insurance contains no coverage for criminal prosecutions. J.A. 144.

12 Included in this information is the nature of the abortion procedure, its risks and alternative treatments, the probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. Additionally, §§ 3205 and 3208 mandate that physicians or counselors offer the pregnant woman materials that give detailed descriptions and pictures of the fetus at two-week gestational increments from fertilization until full-term, as well as the names of agencies offering alternatives to abortion; and inform the woman of the availability of medical assistance benefits and of the father's liability for child support payments if she carries her pregnancy to term. 289a-290a, 298a-300a.

and is a "poorly veiled attempt[ ] . . . to disguise elements of discouragement of the abortion decision." 180a. By inserting its anti-abortion message into the informed consent dialogue, the Commonwealth has transformed the physician from the impartial counselor mandated by accepted medical standards into a partisan proponent of the state's ideology.

Section 3205 also intrudes heavily on physicians' discretion by requiring them to supply a specified package of information to all patients. This conflicts with the accepted medical practice of giving patients information tailored to their individual needs and circumstances, out of respect for the patient who will be "autonomously making the decision." 177a; J.A. 161.

Much of the required information is not only inflammatory and misleading, but is beyond the expertise of medical professionals. 179a-180a. Physicians or counselors are required to offer women seeking abortions "printed materials which describe the unborn child and list agencies which offer alternatives to abortion." 290a. Some of the listed agencies, however, are ideological anti-abortion groups, notorious for giving women inflammatory and inaccurate information. *See* 169a. Women must also be told that medical assistance benefits may be available if they carry their pregnancies to term, and that the "father of the unborn child is liable to assist in the support of her child . . . ." 290a. But, in truth, most women will be ineligible for medical assistance benefits, or will, in practice, be unable to collect adequate child support payments if they carry their pregnancies to term. *See* 179a-180a. This information will convey the message that the benefits will be adequate to raise a child—a cruel deception for low-income women whose decisions may be based, in part, upon their financial ability to raise additional children.

Before a woman may obtain an abortion, § 3205 also mandates that she delay an additional 24 hours after she is given the state-mandated information.[13] By imposing an inflexible

13 In no other area of medical decision-making does the Commonwealth require a 24-hour delay after a patient gives informed consent. J.A. 173.

waiting period for all women, the Commonwealth significantly burdens their rights to terminate pregnancy. Because of scheduling complications and a shortage of physicians,[14] the 24-hour mandatory delay will often "result in delays far in excess of 24 hours. For the majority of women in Pennsylvania, delays will range from 48 hours to two weeks." 172a. Moreover, the 24-hour delay will force every woman to make a minimum of two visits to an abortion provider. 171a. Solely because of the Act, the thousands of Pennsylvania women who travel hundreds of miles to obtain an abortion, 172a, must assume the additional costs of transportation, overnight lodging, lost wages, food, and childcare. 172a, 186a. The delay will also twice subject "many women to the harassment and hostility of anti-abortion protestors . . . ." 172a.[15]

As the district court found, mandated delay will impose the greatest burdens on low-income women, women who live far from an abortion provider, and women "who have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave." 173a. Indeed, it is likely that many battered women will face additional battering during the mandated delay. 197a-198a; J.A. 227.

14 In 1987, there were no abortions performed in 40 out of 67 counties in Pennsylvania. In 12 other counties, there were ten or fewer abortions performed. Pennsylvania Induced Abortion Report, January-December, 1987. These figures are consistent with national data finding that 83% of the counties in the United States have no abortion provider. Stanley K. Henshaw and Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 Fam. Plan. Persp. 102, 106 (1990).

15 Section 3205's mandatory delay will also damage the health of women by increasing physical and psychological stress, and the risk of complications. For each week of delay, the risk of complications from abortion increases by approximately 30% and the risk of death increases by approximately 50%. *See* 152a-153a. *See also* American Public Health Association Recommended Program Guide for Abortion Services, 70 Am. Pub. H. J. 652, 654 (1980). Moreover, the forced delay will push some women into the second trimester, substantially increasing both the cost and medical risks of an abortion. 173a.

C. "Informed" Parental Consent.

Creating obstacles far harsher than any prior parental involvement statute reviewed by this Court, § 3206's requirement of "informed" parental consent forces both the parent and the young woman to come to the physician at least 24 hours before the abortion for the biased counseling required by § 3205. 292a-297a. The provision thus necessitates at least one visit to the physician by the woman's parent and at least two, and more likely three, visits by the young woman herself, thereby creating "layers of obstacles" that unduly burden a young woman's ability to get an abortion. *See* 172a, 186a.[16]

Moreover, requiring a consenting parent to schedule an appointment with the physician will cause serious delays, even where the young woman's parent is supportive of her decision. For example, many parents will be unable to visit the physician promptly due to work schedules, family obligations, burdensome travel, illness, or lack of financial resources. 183a, 185a; J.A. 617. Where the parent is hostile to the young woman's abortion decision, the provision may result in unnecessary and dangerous delays, or an effective and arbitrary veto of the young woman's abortion choice. J.A. 616.

As the district court found, delays imposed by § 3206 can be "both dangerous and prohibitive" because young women often obtain abortions much later in their pregnancies than

16 "Informed" parental consent for young women seeking abortion is a significant departure from state law that recognizes the importance of providing confidential health services to pregnant women under the age of 18. Pennsylvania law allows pregnant young women to consent to medical or health services to treat pregnancy and venereal disease. 35 Pa. Cons. Stat. Ann. § 10103 (1977). Similarly, following a pregnancy, a young woman may consent to medical, dental, and health services for herself, 35 Pa. Cons. Stat. Ann. § 10101 (1977), and her children. 35 Pa. Cons. Stat. Ann. § 10102 (1977). Additionally, a young woman may consent to medical, dental, or health services in cases where a delay in treatment would increase the risk to the young woman's life or health. 35 Pa. Cons. Stat. Ann. § 10104 (1977).

older women. 183a.[17] Thus, young women are more likely to be forced into having a second trimester abortion, with its increased health risks, 184a, or may be too late in pregnancy to obtain a safe, legal abortion altogether. Some of these women will resort to desperate measures: they may try to obtain illegal abortions, attempt to self-induce an abortion, or attempt suicide. 185a; J.A. 611, 618.

D. Definition of Medical Emergency.

Although §§ 3205, 3206, and 3209 do not apply in medical emergencies, the Act limits this important exception to

> [t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.

18 Pa. Cons. Stat. Ann. § 3203; 289a. A far cry from the accepted definition of medical emergency, which gives a physician broad discretion to protect a woman's health,[18] the vague and narrow definition will "interfere[ ] with a physician's ability to act in accordance with his [or her] best medical judgment." 157a.[19] As a result, the Act will cause panic,

17 For a variety of reasons, young women deny that they are pregnant and postpone decision-making. Some are unaware that they are pregnant because they do not know about their menstrual cycles or because they menstruate irregularly. Other young women delay seeking medical help because of fear, anxiety, and hesitation in divulging to parents sexual activity, pregnancy, or their desire to have an abortion. 183a-184a.

18 Pennsylvania's Emergency Medical Services Act, 35 Pa. Cons. Stat. Ann. § 6923 (Supp. 1991), broadly and clearly defines the term as circumstances "resulting in a need for immediate medical intervention." 155a.

19 Although the Act permits physicians to exercise their "good faith judgment" in applying the medical emergency exception, the district court found that this "does not alter the fact that a 'serious risk of substantial and irreversible impairment of major bodily function' must exist for a situation to constitute a medical emergency under the Act." 157a.

confusion, and delay in the provision of emergency medical services to pregnant women, and will hinder the physician's ability "to make a rapid response to the detriment of the health of the [ ] patient. . . ." 156a.[20]

The district court identified three medical conditions—inevitable abortion, premature ruptured membrane, and preeclampsia—that exemplify those that would fall outside the Act's definition of "medical emergency." The court found that failure to perform an immediate abortion in these circumstances would pose a threat to the woman's health, but would not pose a "serious risk of substantial and irreversible impairment of major bodily function."

E. Public Disclosure and Reporting Requirements.

Sections 3207(b) and 3214(f) require that every abortion facility, including individual physicians, file with the Department of Health a quarterly report listing the name and address of the facility, and the total number of abortions performed by trimester of pregnancy.[21] This information is available for public inspection and copying if the abortion provider receives any state funding, even funding for services wholly unrelated to abortion. 298a, 304a.[22]

Like their counterparts across the nation, Pennsylvania abortion providers and the women seeking care face vicious harassment and violence by opponents of abortion. *See NOW v. Operation Rescue*, 726 F. Supp. 1483, 1488-90 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct.

20 Ultimately, some physicians may refuse to offer emergency services out of fear of potential criminal and civil liability. J.A. 188.

21 A nearly identical reporting provision in the 1982 Act was found unconstitutional. *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 670 (E.D. Pa. 1985).

22 Most abortion providers in Pennsylvania receive Medicaid payments for abortions provided to survivors of rape and incest and women with life-threatening conditions. State funds are also paid to clinics and physicians for related medical care, as well as building costs, and other purposes unrelated to the provision of abortion services. 210a-211a.

1070 (1991). Massive blockades, hate mail, bombings, and kidnapping threats against physicians, clinic employees, and family members are commonplace.[23] Public disclosure of their identity will subject abortion providers to increased harassment, discourage new physicians from offering abortion services, and discourage acceptance of state aid, thereby preventing clinics from offering patients a wide range of health care services. 213a-214a.

Section 3214(a) requires a detailed report for each abortion performed, including the names of the referring physician and those physicians concurring in and assisting late-term abortions.[24] Additionally, the report must disclose the basis for the physician's judgment that an abortion performed after the 24th week was authorized by the Act, § 3214(a)(8), and that a medical emergency existed. § 3214(a)(10). Physicians must also report the basis for their determination of gestational age. § 3214(a)(11).

The evidence demonstrated that these aspects of § 3214(a) serve no legitimate scientific purpose, will deter physicians from referring women to or assisting abortion providers, or from acting in the patient's best interest. 221a-222a. Referring physicians are "extremely protective of their anonymity" for fear that they will be harassed and that they will lose patients or hospital privileges. 219a; J.A. 31-32. Indeed, testimony at trial revealed that physicians would not refer patients to any abortion provider if their names are required on an abortion report. 220a. Evidence also showed that requiring physicians to report the basis for their medical

23 David A. Grimes, *et al.*, *An Epidemic of Antiabortion Violence in the United States*, 165 Am. J. Obst. and Gyn. 1263 (1991). For example, in September, 1989, five opponents of abortion forced their way into the offices of plaintiff Women's Health Services and dumped buckets of tar onto the main patient care area. 212a. The clinic director's sixteen-year-old daughter was threatened with kidnapping, forcing her family to guard her both at home and at school. J.A. 260-63.

24 This report must include the name of the referring physician, agency, or service, and the names of the concurring physician and second physician for any post-24 week abortion authorized by 18 Pa. Cons. Stat. Ann. § 3211(c)(2), (5) (Supp. 1991). *See* § 3214(a)(1).

judgments will make them less willing to act in a pregnant patient's best interests. 222a; J.A. 39.

SUMMARY OF ARGUMENT

Few decisions are more basic to "individual dignity and autonomy" than the right of a woman to choose to terminate or continue a pregnancy. *Thornburgh*, 476 U.S. at 772. So proclaimed this Court only six years ago when it reaffirmed *Roe*, 410 U.S. 113 (1973), and invalidated provisions of a Pennsylvania law virtually identical to those at issue here.

Once again, this Court must reaffirm *Roe* and find unconstitutional Pennsylvania's most recent intrusions on reproductive liberty. Abandoning *Roe* by withdrawing the highest level of constitutional protection would contravene established principles of *stare decisis* and would jeopardize women's dignity and equality. Moreover, history makes clear that overturning *Roe* will not end abortion. Instead, permitting states to criminalize abortion or impose onerous restrictions will tragically and undeniably return thousands of women to back-alley or self-induced abortions. Many will die. Others will be forced by the state to sacrifice their health or to carry unwanted pregnancies to term. *Roe*'s demise will be most devastating for low-income, young, rural, or battered women, who are too vulnerable to overcome state-imposed obstacles.

No legitimate justification supports overturning *Roe*. Fundamental constitutional protection for the abortion right follows logically and necessarily from a century of this Court's decisions recognizing that personal choices affecting bodily integrity, identity, and destiny are largely beyond the reach of government. *Roe*'s trimester framework not only fairly accommodates the interests of the woman and the state, but also serves as a sound guidepost for the courts and state legislatures.

The court of appeals erroneously adopted the vague and unworkable "undue burden" standard of review, which is likely to result in arbitrary and discriminatory applications by

lower courts. In contrast to the clarity and equity of *Roe*, both the "undue burden" and "rational basis" standards would sanction and invite intolerable legislative interference with private reproductive decisions. Adopting these lesser standards would ensure an irrational patchwork of state laws and would return to the vicissitudes of local politics what *Roe* properly removed from that forum.

Even under these deferential standards of review, however, this Court must find unconstitutional the Act's challenged provisions. Mandatory husband notification violates rights of privacy and marital integrity by subjecting intimate marital discussions to state surveillance and control, and endangering the lives and health of married women compelled to notify abusive husbands of their abortion choice. By imposing duties only on women and conferring rights solely on men, the Act also perpetuates the pernicious stereotype that women are subordinate within marriage and incapable of making independent moral decisions. The provision thereby violates the Constitution's equal protection guarantees.

Requiring physicians to provide a litany of state-mandated information violates the longstanding medical principle that the informed consent dialogue must be tailored to the needs of each patient, not used to transform the physician into a partisan proponent of the state's ideology. While furthering no legitimate purpose, the Act's 24-hour mandatory delay forces women to travel to their physicians on at least two, and often three, occasions, thereby increasing the expense and medical risks of abortion.

Far more onerous than other parental consent or notification statutes upheld by this Court, the Act's "informed" parental consent requirement presents so insurmountable an obstacle that even parents who have participated in, support, and consent to their daughter's abortion decision may be unable to comply with the law. Rather than furthering communication between parents and their daughters, the Act forces family life to conform to a state-designed ideal.

Furthering no legitimate state interest, the intrusive public disclosure and reporting requirements merely enhance the

ability of abortion opponents to intimidate physicians through violence and harassment. Finally, the Act's narrow medical emergency exception is inconsistent with well-established medical standards. By denying pregnant women a waiver of the Act's requirements except in the most dire circumstances, this provision will jeopardize women's lives and health and discourage the provision of emergency services to pregnant women.

In view of the immediate harm that will befall women should these provisions go into effect, this Court must resoundingly reaffirm *Roe*. Without its fundamental protection, women will be unable to maintain the measure of equality they have won so far, and this Court will forsake its historic role as guardian of constitutional liberties.

ARGUMENT

I. THIS COURT MUST REAFFIRM THE CENTRAL HOLDING OF *ROE V. WADE* THAT THE RIGHT TO CHOOSE ABORTION IS A FUNDAMENTAL RIGHT PROTECTED BY THE CONSTITUTION.

A. This Court Cannot Uphold the Pennsylvania Statute Without Abandoning the Strict Scrutiny Standard of Review, thereby Overruling *Roe v. Wade*.

This Court's landmark decision in *Roe*, 410 U.S. 113 (1973), holds profound significance for all Americans. In finding a Texas abortion ban unconstitutional, this Court did far more than prohibit the most draconian abortion laws. Rather, this Court held that the right to make private decisions about childbearing is a constitutional liberty of fundamental dimension.

Roe mandates that state laws that intrude upon reproductive choices—whether to carry a pregnancy to term or have an abortion—must be examined with the most exacting scrutiny. *Id.* at 155. Under this standard, only laws necessary and narrowly tailored to serve the most compelling state interests pass constitutional review. *Id.*

This Court has consistently applied *Roe*'s strict scrutiny standard to invalidate not only abortion bans, but also laws that encumber the abortion choice with delay, administrative hurdles, or expense, or that disproportionately harm young, low-income, rural, or battered women. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 193-200 (1973) (accredited hospitalization requirement, hospital review committee approval, and two physician concurrence requirements); *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-75 (1976) (husband and parental consent); *Akron*, 462 U.S. at 432-39, 442-51 (24-hour mandatory delay, biased counseling, doctor-only counseling, and second trimester hospitalization requirements); *Thornburgh*, 476 U.S. at 759-68 (biased patient counseling; reporting and public disclosure requirements). *Roe*'s central premise—that the right to choose abortion is a fundamental right protected by the most exacting scrutiny—thus forbids legislation that places roadblocks before women seeking abortion or that forecloses the abortion option for those women too vulnerable to overcome the state-imposed burdens.[25]

The district court found, and the court of appeals acknowledged, that the Pennsylvania law is unconstitutional under the strict scrutiny standard of *Roe*.[26] In upholding restrictions that this Court already held unconstitutional under *Roe*, the court of appeals found that women no longer enjoy fundamental constitutional protection for the right to choose abortion. Declining to apply strict scrutiny, the court of appeals

25 In this regard, *Roe* is entirely consistent with this Court's jurisprudence in other areas. Recognizing that constitutionally protected freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960), this Court has repeatedly invalidated statutes that inhibit the exercise of fundamental rights. *See Shapiro v. Thompson*, 394 U.S. 618 (1969) (one-year residency requirement as a condition on welfare assistance violates the right to travel); *Bates, supra* (compulsory disclosure of membership lists violates right of association); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (ordinance forbidding distribution of any kind of literature without permission from city manager violates the right of free expression).

26 *See* 30a, 225a. Similarly, the Commonwealth effectively conceded that the Pennsylvania law could not withstand scrutiny under *Roe* when it asked the lower courts to apply a new, less rigorous standard of review. 225a.

measured the constitutionality of the Pennsylvania law under the new, far less protective "undue burden" standard.

Because the invalidity of the instant provisions under *Roe* is indisputable, this Court cannot sustain the decision below without overruling *Roe* or so eviscerating its core holding as to render it meaningless. As shown below, *Roe* is eminently sound in principle and workable in practice. Therefore, no valid justification exists for this Court to take the radical and unprecedented step of withdrawing the highest level of constitutional protection from this fundamental right.[27]

B. The Doctrine of *Stare Decisis* Demands Reaffirmation of *Roe*.

This Court has repeatedly held that the doctrine of *stare decisis* "is of fundamental importance to the rule of law." *Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563 (1991) (quoting *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). Fidelity to precedent

> ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion. [It] permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986).[28] "[E]ven in constitutional cases, the doctrine carries such persuasive

27 In addition to the "liberty" guarantee of the Fourteenth Amendment, the right to abortion may be grounded in other constitutional rights: equal protection, freedom of religion, the rights to be free from involuntary servitude and cruel and unusual punishment, and the rights retained by the people under the Ninth Amendment. In the event that this Court abandons *Roe*, it should remand this case for consideration of the other constitutional principles that support the right to choose abortion.

28 *See generally Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("*[S]tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary

force that . . . departure from precedent [must] be supported by some 'special justification.' " *Payne v. Tennessee*, 111 S. Ct. 2597, 2618 (1991) (Souter, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

By overruling *Roe*, this Court would sanction an abrupt departure from 200 years of American constitutional history. Never before has this Court bestowed, then taken back, a fundamental right that has been a part of the settled rights and expectations of literally millions of Americans for nearly two decades.[29] To regress by permitting states suddenly to impose burdensome regulations or criminalize conduct that a full generation of women has always known to be constitutionally protected would be anathema to any notion of principled constitutional decision-making.[30]

Hence, overturning *Roe* would implicate the weightiest of *stare decisis* concerns: as Justice Harlan recognized, *stare decisis* "provides the stability and predictability required for the ordering of human affairs over the course of time . . . ." *Williams v. Florida*, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part). More recently, this Court emphasized:

> *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations.

Hilton, 112 S. Ct. at 564.[31]

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discretion.' " (quoting *The Federalist*, No. 78, at 490 (Alexander Hamilton) (H. Lodge ed. 1888)).

29 By 1989, approximately sixteen million women had obtained legal abortions. If current abortion rates continue, nearly half of all women of reproductive age will have had an abortion by the time they reach age forty-five. Rachel B. Gold, *Abortion and Women's Health: A Turning Point for America?* 22 (Alan Guttmacher Institute, 1990) [hereinafter *Abortion and Women's Health*].

30 *Stare decisis* requires adherence to the strict scrutiny standard and trimester framework of *Roe*, as well as its specific holding. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).

31 *Cf. Payne*, 111 S. Ct. at 2610 ("Considerations in favor of *stare decisis* are at their acme . . . where reliance interests are involved").

Further, *Roe* does not stand alone. On the contrary, it defines the contours of privacy, which protects individuals from governmental interference in personal decision-making and is the foundation for numerous important freedoms.[32] As Justice Scalia has noted, "the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes premised on their validity." *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

Twice in the past decade, this Court has reconsidered and resoundingly reaffirmed *Roe*. In *Akron*, 462 U.S. 416, this Court rejected the argument that *Roe* "erred in interpreting the Constitution," *id.* at 419, and enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* . . . ."

> That case was considered with special care. It was first argued during the 1971 Term, and reargued—with extensive briefing—the following Term. The decision was joined by the Chief Justice and six other Justices. Since *Roe* was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.

Id. at 420 n.1.

In *Thornburgh*, this Court held: "[a]gain today, we reaffirm the general principles laid down in *Roe* and in *Akron*

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32 For example, courts have relied on *Roe* when recognizing the right to use contraceptives, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977); the right to be free from overly restrictive maternity leave regulations, *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974); the right to marry, *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978); the right to informational privacy, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); the right to be free from forced sterilization, *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978); the right of bodily integrity, *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977); and the right to be free from court-ordered contraception, *People v. Pointer*, 199 Cal. Rptr. 357, 364 (Ct. App. 1984), or court-ordered abortion, *In re Mary P.*, 444 N.Y.S.2d 545, 546-47 (Fam. Ct. 1981).

. . . . [T]he constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy." 476 U.S. at 759.

Given the certainty of disrupting the lives and settled expectations of countless women, overturning *Roe* would be "a rare and grave undertaking," *Webster*, 492 U.S. at 558 (Blackmun, J., concurring in part and dissenting in part), which could be justified only by a strong showing by the Commonwealth that special circumstances demand that result. Only if the precedent is "unsound in principle," "unworkable in practice," or has led to inconsistent, unforeseen, or anomalous results, *see Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 546-47 (1985); *Vasquez*, 474 U.S. at 266, would this radical step be warranted.[33] None of these justifications is present here.

C. *Roe* Is Soundly Based in the Constitution and Sets Forth a Fair and Workable Standard of Adjudication.

1. The decision to terminate or continue a pregnancy is a fundamental right.

This Court has long recognized rights of privacy and bodily integrity. As early as 1891, it held,

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . .

Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251-52 (1891). *See also Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the government, the right to be let alone, the most comprehensive of rights and the right most valued by civilized men"). Throughout the last century, this Court recognized that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). *See also Stanley v. Georgia*, 394 U.S. 557, 564 (1969). These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Eisenstadt*, 405 U.S. at 453; *Thornburgh*, 476 U.S. at 772. *See also Thornburgh*, 476 U.S. at 777 n.5 (Stevens, J., concurring) (concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole") (quoting Charles Fried, Correspondence, 6 Phil. & Pub. Aff. 288-89 (1977)).

In *Roe*, this Court correctly applied these principles to a woman's right to choose abortion. The decision to terminate or continue a pregnancy has an impact on a woman's life equal to, if not greater than, decisions about contraception or marriage. 410 U.S. at 153.[34] As this Court held in *Thorn-*

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33 Overruling a decision so recently reaffirmed would seriously undermine public confidence in the integrity of this Court, especially when nothing has changed but the Court's composition. *See* Brief *Amici Curiae* of Certain Members of Congress. *See Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (*stare decisis* gives citizens "confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office"). "[I]t should go without saying that the vitality of . . . constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). *See also Thornburgh*, 476 U.S. at 771-72.

34 "Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the post-conception decision that is the more serious." *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring). An individual denied the right to use contraception may be able to avoid pregnancy by avoiding sexual intercourse. A pregnant woman has no alternative besides abortion to avoid forced parenthood, *Carey*, 431 U.S. at 713

burgh, 476 U.S. at 772, few decisions are more basic to "individual dignity and autonomy," or more appropriate to the "private sphere of individual liberty," than the uniquely personal and self-defining decision of whether to continue a pregnancy. *See also Carey*, 431 U.S. at 684.

State restrictions on abortion violate a woman's privacy in two ways.[35] First, compelled continuation of a pregnancy infringes on a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. As Justice O'Connor explained in *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2856 (1990) (O'Connor, J., concurring),

> Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, this Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.

In addition to the dramatic physical changes that take place during pregnancy,[36] pregnant women also experience a wide range of adverse health consequences. As many as ninety percent of pregnant women develop gastrointestinal problems, including nausea and vomiting.[37] Many women confront potentially more serious problems including gesta-

(Stevens, J., concurring), and pregnancy itself is all too often the result of rape, incest, or contraceptive failure—circumstances outside the woman's control.

35 *See generally* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 126-30 (1989).

36 Pregnancy increases a woman's uterus 500 to 1000 times its original capacity and her body weight by 25 pounds or more. F. Gary Cunningham, Paul C. MacDonald & Norman F. Gant, *Williams Obstetrics* 129-34, 136-37 (18th ed. 1989) [hereinafter *Williams Obstetrics*].

37 David N. Danforth and James R. Scott, *Obstetrics and Gynecology* 334-35 (5th ed. 1986) [hereinafter *Obstetrics and Gynecology*]. Other common problems include back pain, varicose veins, hemorrhoids, headaches, and water retention. *Williams Obstetrics* at 137, 270-73.

tional diabetes, hypertension,[38] preeclampsia (high blood pressure, water retention, and protein in urine), and eclampsia (a severe form of preeclampsia characterized by headaches and seizures potentially leading to coma).[39]

Labor and delivery pose additional health risks and physical demands. Vaginal delivery entails extreme pain, often lasting up to thirteen hours and in many cases longer,[40] and substantial risk of infection and laceration.[41] The nearly twenty-five percent of women who deliver by cesarean section are exposed to even higher risks of death and adverse health consequences.[42]

In sum, as Chief Justice Rehnquist has recognized, pregnancy entails "profound physical, emotional and psychological consequences . . . ." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981). Indeed, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. *See e.g. Botsford*, 141 U.S. at 251-52 (refusing to order phys-

38 Hypertension complicates about six or seven percent of pregnancies. *Williams Obstetrics* at 3. During pregnancy, hypertensive women are at high risk for serious complications, including convulsions and coma. *Id.*

39 *Williams Obstetrics* at 654-72, 818-19. The medical risks of pregnancy are compounded for certain women. Among those facing the greatest risks are teenagers, especially those younger than 15. They suffer high incidences of toxemia, anemia, premature labor, and prolonged labor. *See* Jane Menken, *The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing*, in *Adolescent Pregnancy and Childbearing: Findings from Research* 181, 187 (Catherine S. Chilman ed., 1980).

40 *See* E.J. Quilligan, *Prenatal Care* in *Gynecology and Obstetrics: The Health Care of Women* 579, 614 (Seymour L. Romney, *et al.* eds., 2d ed. 1981) [hereinafter *Gynecology and Obstetrics*].

41 *Id.* at 626-27, 632-33, 637-38.

42 Robert K. Creasy and Robert Resnik, *Maternal-Fetal Medicine: Principles and Practice* 530 (2d ed. 1989). In 25% to 50% of cesarean sections, women face such complications as infection, hemorrhage, aspiration, swelling of the lungs, and pulmonary embolism. *Obstetrics and Gynecology*, at 738. The risk of maternal death is two to four times greater than in vaginal delivery. Carl J. Paverstein, *Clinical Obstetrics* 887 (1987).

ical examination); *Winston v. Lee*, 470 U.S. 753 (1985) (invalidating surgical removal of a bullet from a murder suspect); *Rochin v. California*, 342 U.S. 165 (1952) (invalidating stomach-pumping).[43]

In addition to violating principles of bodily integrity, abortion restrictions also deprive women of the right to make autonomous decisions about reproduction and family planning—critical life choices that this Court has long deemed central to the right of privacy. *Roe*, 410 U.S. at 152-53; *id.* at 211 (Douglas, J., concurring) (Fourteenth Amendment protects "freedom of choice in the basic decisions of . . . life"). Because parenthood has a dramatic impact on a woman's educational prospects,[44] employment opportunities,[45] and self-determination, restrictive abortion laws deprive

43 In contrast, the severity and frequency of death or serious health consequences from abortion is significantly less than with childbirth. A woman is 20 times more likely to die from giving birth than from having an abortion. Katherine Koot, Jacqueline D. Forrest, and Susan Harlap, *Comparing the Health Risks and Benefits of Contraceptive Choices*, 23 Fam. Plan. Persp. 54, 57 (1991). *See also* Scott A. Lebolt, David A. Grimes, and Willard Cates, Jr., *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 191 (1982). Up to the eighth week of pregnancy, abortion is more than 20 times safer than childbirth. *Id.* at 191. Similarly, the non-fatal health risks associated with legal abortion are very limited and substantially lower than the risks of childbirth. *Williams Obstetrics* at 506.

44 Forced parenthood curtails the ability of teenagers to obtain even the most basic education. "[Y]oung women who give birth while they are in junior high school or high school complete on average fewer years of school, are less likely to earn a high school diploma, and are less likely to go on to college and graduate study than those who delay childbearing until their twenties." National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* 126 (Cheryl D. Hayes ed. 1987). Indeed, 56% of women who became mothers at age 17 or younger do not complete high school. Dawn M. Upchurch and James McCarthy, *Adolescent Childbearing and High School Completion in the 1980s: Have Things Changed?*, 21 Fam. Plan. Persp. 199, 200 (1989). *See also* Laurie Zabin, Marilyn Hirsch and Mark Emerson, *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status and Subsequent Pregnancy*, 21 Fam. Plan. Persp. 248 (1989).

45 Employment opportunities for women with children are severely limited. *See generally* Reva Siegal, *Reasoning from the Body: A Historical*

her of basic control of her life. For these reasons, "the decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices." *Carey*, 431 U.S. at 685. Indeed, the right to choose abortion partakes of those constitutional freedoms at the heart of a free society: the freedoms of spirit and self-determination. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-37, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977).

2. The *Roe* trimester framework is workable and fairly accommodates competing interests.

In *Roe*, this Court identified only two state interests that are sufficiently compelling to override a woman's fundamental right to choose abortion. The state has "an important and legitimate interest in preserving and protecting the health of the pregnant woman"[46] and an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162.

Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 375-78 (1992); Victor R. Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persp. 25 (1989). Because the workplace typically does not accommodate parental responsibilities, and because child care is often unavailable or unaffordable, women, who bear primary responsibility for young children, are severely disadvantaged in the workplace. Many women are forced to leave their jobs to care for their children. *See Women's Work, Men's Work: Sex Segregation on the Job* 73-74 (Barbara F. Reskin and Heidi I. Hartmann eds. 1986). Others obtain part-time work or move to lower paying, less skilled positions in order to meet parental responsibilities. *Id.* at 74. *See also* Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1786 (1986) (the "addition of *each* child enhances the man's earnings by another three percent while depressing that of the woman by fully ten percent"). Where a woman raises a child alone, the economic consequences are even more devastating. U.S. Bureau of the Census, Current Population Reports: Special Studies, Series P-23, No. 162, *Studies in Marriage and the Family*, 18 (approximately half the children in households headed by women live in poverty).

46 Petitioners do not dispute that the state possesses a compelling interest in the protection of women's health. The restrictions at issue here, however, fail to further this interest. *See infra*, Section IV.

Roe's trimester framework establishes that the latter interest is not sufficiently compelling to override a woman's right to choose abortion until the point of viability, i.e. that stage in pregnancy when the fetus is capable of independent survival. Even then, the state's interest is paramount only in cases in which the woman's life or health are not endangered by continued pregnancy. *Id.* at 163-64.

The *Roe* trimester framework constitutes a fair and logical means of accommodating the interests of the woman and the state. The compelling state interest in the fetus logically arises at the point of viability:

> The viability line . . . marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling.

Webster, 492 U.S. at 553-54 (Blackmun, J., concurring in part and dissenting in part).[47] Moreover, by placing the compelling point at fetal viability, *Roe* fairly and sensibly "safeguard[s] the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life."[48] *Id.* at 553.

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47 *Roe* is consistent with the historic legal tradition of assigning greater value to fetal life late in pregnancy. As this Court observed in *Roe*, to the extent that limitations on abortion did exist in ancient and common law, they were imposed after quickening or "viability." *Roe*, 410 U.S. at 132-36. *See generally* Brief *Amici Curiae* of American Historians.

48 The suggestion that the point of viability will recede with advances in medical technology and that *Roe* is therefore on "a collision course with itself," *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting), has no medical foundation. While substantial strides have been made in recent years in saving infants born between 24 and 28 weeks, the earliest point of fetal viability has remained at about 24 weeks gestation—the same as it was at the time *Roe* was decided. *Webster*, 492 U.S. at 554 n.9 (Blackmun, J., concurring in part and dissenting in part). *See generally* Brief *Amici Curiae* of 167 Distinguished Scientists and Physicians, Including 11 Nobel Laureates at 9-13, *Webster*, *supra* (No. 88-605).

This Court must reject the view that the state's interest in potential life is compelling throughout pregnancy.[49] That view would render meaningless this Court's recognition of the abortion choice as a protected liberty interest of fundamental importance.[50] Any restriction, even criminalization of abortion in virtually all circumstances, might be justified by reference to the state's compelling interest in potential life. *Webster*, 492 U.S. at 555-56 (Blackmun, J., concurring in part and dissenting in part). In addition, a compelling interest in potential life throughout pregnancy might justify other extreme intrusions on pregnant women's liberty. For example, would government be free to force pregnant women to act in whatever ways it determined were optimal for the fetus in order to further its compelling interest in fetal life?[51] Could government compel a woman to undergo a cesarean section or fetal surgery to further its interests? Clearly, these

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49 *See, e.g., Thornburgh*, 476 U.S. at 795 (White, J., dissenting).

50 Surely, as the Court of Appeals for the District of Columbia recognized, "a fetus cannot have rights . . . superior to those of a person who has already been born." *In re A.C.*, 573 A.2d 1235, 1244 (D.C. 1990) (*en banc*). *See also Roe*, 410 U.S. at 158.

51 Imagine, for example, that a state made the following findings: complete rest in the first three months of pregnancy reduced miscarriages by 9%, and working at video display terminals increased miscarriages by 4%. On these bases the state passed a law prohibiting all pregnant women from working at display terminals or working anywhere more than four hours a day during the first three months of pregnancy. In both of these cases, if the state justified the imposition by asserting its compelling governmental interest in protecting all fetal life, it could contend that there was no less restrictive alternative to this seemingly Draconian measure.

Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. Pa. L. Rev. 83, 116 (1989). *See also* Dawn M. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights of Liberty, Privacy, and Equal Protection*, 95 Yale L. J. 599 (1986).

profoundly disturbing derailments of personal liberty would be incompatible with this Court's recognition as "fundamental" those rights necessary to a "free, egalitarian and democratic society." *Thornburgh*, 476 U.S. at 793 (White, J., dissenting). *See also International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1207 (1991) ("[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents").[52]

Finally, the *Roe* trimester framework has been a workable guidepost for courts and state legislatures. During the last nineteen years, lower courts, which have cited the decision in over 3500 cases, have had little difficulty applying *Roe*'s clear mandates. With consistent application and reaffirmation by this Court, questions regarding *Roe*'s meaning were resolved and lower courts were readily able to determine whether state restrictions were constitutional.[53] State legislatures, also understanding *Roe*'s mandates, passed fewer laws restricting abortions for adult women.[54]

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52 In other contexts, this Court has refused to allow a state's interest to ride roughshod over a constitutional right. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (interest in redressing societal discrimination deemed not to be sufficiently compelling to justify race-conscious remedies because it " 'has no logical stopping point' ") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion)).

53 *See, e.g., Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983), *aff'd in part and rev'd in part sub nom. Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984), *appeal dismissed sub nom. Diamond v. Charles*, 476 U.S. 54 (1986); *Margaret S. v. Treen*, 597 F. Supp. 636, 653-66 (E.D. La. 1984), *aff'd sub nom. Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986); *Ragsdale v. Turnock*, 841 F.2d 1358, 1372-73 (7th Cir. 1988), *proceedings deferred*, 493 U.S. 987 (1989).

54 For example, in 1979, the year after the Akron ordinance was adopted, 10 states enacted similar laws. In apparent response to lower federal court decisions declaring these laws unconstitutional, the numbers subsequently declined to four laws in 1980, and three in 1981. Patricia Donovan, *Fertility-Related State Laws Enacted in 1981*, 14 Fam. Plan. Persp. 63, 66 (1982). In 1984, the year after *Akron* was decided, only one state legislature enacted a comprehensive anti-abortion statute. The Alan Guttmacher Institute, Legislative Record, State Legislatures—1984 Bills Enacted (1984).

Even if it could be said, however, that the application of *Roe* has posed difficulties, complexity in application has never provided the basis for abandoning constitutional protection for a fundamental right. *Daniels v. Williams*, 474 U.S. 327, 334-35 (1986) (citing *LeRoy Fibre Co. v. Chicago, M. & St. P. R. Co.*, 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring)); *see also Webster*, 492 U.S. at 549-50 (Blackmun, J., concurring in part and dissenting in part). A doctrine's legitimacy is not undermined by the challenge of applying constitutional doctrines and making careful differentiations between similar circumstances. 492 U.S. at 549-52 (Blackmun, J., concurring in part and dissenting in part). Rather, "these careful distinctions reflect the process of constitutional adjudication itself" and the discharge of this Court's "duty to do justice carefully, especially when fundamental rights rise or fall with [its] decision." *Id.* at 550, 552.

D. *Roe*'s Guarantee of Safe, Legal Abortion Has Been of Profound Importance to the Lives, Health, and Equality of American Women.

In addition to its soundness and workability as a constitutional doctrine, *Roe* has proven an enormously wise decision of immeasurable benefit to the lives, health, and equality of American women. First, *Roe* has allowed millions of women to escape the dangers of illegal abortion and forced pregnancy. Despite the illegality or highly restricted availability of abortion in the years before *Roe*, women always obtained abortions.[55] Women who could afford the often extraordinary expense traveled to a place where abortion was legal;[56]

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55 *See generally*, Ellen Messer and Katherine E. May, *Back Rooms: Voices from the Illegal Abortion Era* (1988); *Abortion and Women's Health*, *supra* note 29.

56 Prior to 1970, when abortion was legalized in New York, women traveled to foreign countries to obtain abortions. *Women Flock to London Seeking Abortions Under Liberal Law*, Medical World News Vol. 10, pp. 24-27 (1969). In 1972, 44% of all abortions in the United States were obtained outside a woman's state of residence. *Abortion and Women's Health* at 3. For example, in the two and one-half years preceding *Roe*, nearly 350,000 women traveled to New York State to obtain a legal abortion. *Id.* The need to travel resulted in delayed abortions and, consequently, increased medical risks. *Id.*

less affluent women turned to illegal procedures or self-induced abortions. In the 1950's and 1960's, an estimated 200,000 to 1.2 million illegal abortions occurred annually in the United States.[57] As a result of these back-alley and self-induced abortions, as many as 5000 to 10,000 women died each year,[58] and many other women suffered severe physical and psychological injury. Still other women endured forced pregnancy and its attendant health risks.[59] And history makes clear that, without constitutional protection, low-income women, who are disproportionately women of color, suffered the most.[60]

Second, the nationwide legalization of abortion following *Roe* resulted in dramatic advances in the safety of abortion, and, as a consequence, there were substantial decreases in the total number of abortion-related deaths and complications. Between 1973—the year *Roe* was decided—and 1985, the death rate for abortion fell more than eight times, from 3.4 deaths per 100,000 in 1973 to 0.4 deaths per 100,000 in 1985.[61] Similarly, abortion-related complications requiring hospitalization fell sharply during the 1970's, with the steepest drop following *Roe* in 1973.[62] Today, at all points in preg-

57 Christopher Tietze and Stanley K. Henshaw, *Induced Abortion: A World Review* 43 (6th ed. 1986); Willard Cates, Jr. and Roger W. Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 89 (1976) [hereinafter *Illegal Abortions*].

58 *See* Lawrence Lader, *Abortion* 3 (1966); *Illegal Abortions* at 86-90; Richard H. Schwarz, *Septic Abortion* 7 (1968).

59 *See* Section I.C.1. *supra*. Women with unwanted pregnancies have a higher rate of post-partum infection, hemorrhage, and post-partum depression, and sometimes lasting psychological damage, than women who want to carry their pregnancies to term. Willard Cates, Jr., *Legal Abortion: The Public Health Record*, 215 Sci. 1586, 1587 (1982).

60 Mortality rates from illegal abortions were as much as 12 times higher for women of color than for white women. *Illegal Abortions* at 87-88. "More than two-thirds of the women who died from illegal abortions from 1972 to 1974 were black or from some other minority group." *Abortion and Women's Health* at 5. *See generally* Brief *Amici Curiae* of NAACP Legal Defense Fund, *et al.*

61 *Abortion and Women's Health* at 28.

62 *Id.* at 32.

nancy, abortion poses a lower risk of death than does childbirth.[63]

Experience throughout this country's history amply demonstrates that overturning *Roe* will not end abortion. Instead, permitting states to criminalize abortion or impose burdensome restrictions, either singularly or cumulatively, will tragically and undeniably return women to illegal, back-alley practitioners or self-abortions.[64] As in the days before *Roe*, the number of abortion-related deaths and injuries will soar and women will be forced to continue unwanted pregnancies against their will.

Finally, by affording women greater control over their childbearing, *Roe* has permitted American women to participate more fully and equally in every societal undertaking. The option of safe, legal abortion has enabled great numbers of women to control the timing and size of their families and thus continue their education, enter the workforce, and otherwise make meaningful decisions consistent with their own moral choices. As a result, women have experienced significant economic and social gains since *Roe*.[65] It is simply unconscionable for this Court to allow hostile state legislatures to force women back to the days when "the female [was] destined solely for the home and rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975). To do so would wreak havoc on a century of constitutional doctrine

63 Tietze & Henshaw, *supra* note 57, at 107-13. Induced abortion is one of the most common and safest surgical procedures performed in this country, with half the risk of death involved in tonsillectomy and one-hundredth the risk of death involved in appendectomy. Warren M. Hern, *Abortion Practice* 23-24 (1984). *See also supra* note at 43.

64 For example, because Indiana Public Law 106 required parental consent, 17-year-old Rebecca Bell resorted to an illegal abortion, which resulted in a fatal septic infection. Judy Mann, *Illegal Abortion's Deadly Price*, Washington Post, Aug. 3, 1990, at C3.

65 For example, there has been a substantial increase in women's labor force representation and a diminution in the wage gap between men and women. *See* Fuchs, *supra* note 45, at 36-37; *Women's Work*, *supra* note 45, at 23-24.

and "cast[ ] into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children." *Webster*, 492 U.S. at 557 (Blackmun, J., concurring in part and dissenting in part).

II. THE "UNDUE BURDEN" TEST ADOPTED BY THE COURT OF APPEALS IS VAGUE AND UNWORKABLE.

By stretching logic, precedent, and the bounds of its own authority, the court of appeals adopted the less protective "undue burden" standard, which has never commanded a majority or even a plurality of this Court. By so doing, the court of appeals rejected *Roe*, *Akron*, and *Thornburgh* and turned "a single opinion that lacks majority support into national law." *King v. Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (*en banc*) (finding inapplicable *Marks v. United States*, 430 U.S. 188 (1977)). *But see Coe v. Melahn*, No. 90-1552 (8th Cir. Mar. 2, 1992).

More important, the "undue burden" test is seriously flawed. First, this Court has never applied the "undue burden" analysis to legislation targeting constitutionally protected interests.[66] Unlike strict scrutiny, whose hallmarks are

66 Relying upon *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), Justice O'Connor argues in *Akron* that the undue burden standard is not novel to constitutional law. 462 U.S. at 462 (O'Connor, J., dissenting). But none of these cases apply an "undue burden" analysis. In *Rodriguez*, Justice Powell focuses on whether the right to education is a fundamental right, not on whether that right had been substantially infringed. 411 U.S. at 34-37. Moreover, the Court makes clear that strict scrutiny is triggered in cases involving "legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty." *Id.* at 38 (citations omitted). In *Gibson*, although Justice Goldberg occasionally discussed the "substantial" infringement of the right of free association, the Court applied the "strict scrutiny" standard and never examined the degree of interference necessary to trigger this exacting level of review. 372 U.S. at 545-46. Similarly, in *Bates*, the Court held that "where there is a significant encroachment upon personal liberty," the state must demonstrate a compelling purpose. 361 U.S. at 524. But the intent of this discussion was to characterize the interference with petitioner's rights as "neither speculative nor remote." *Id.* Indeed, in *Bates* as in *Gibson*, the Court pointed out that constitutional freedoms are protected against "subtle" governmental interference as well as direct restrictions. *Id.* at 523. *See also Gibson*, 372 U.S. at 544. Moreover, the Court's reliance upon *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), makes clear that the traditional strict scrutiny standard was used to invalidate under the First Amendment the state-mandated disclosure of membership lists.

known, and which effectively safeguards the right to choose abortion from governmental interference, *see* Section I.C. *supra*, the "undue burden" test is a novel concept.

Second, the "undue burden" test provides wholly inadequate protection for women seeking abortions. Although some anti-choice commentators have suggested that the "undue burden" test is an acceptable middle ground between the strict scrutiny and rational basis tests, *see* James Bopp, Jr. and Richard E. Coleson, *What Does Webster Mean?*, 130 U. Pa. L. Rev. 157 (1989), all available clues to its application demonstrate that the test provides inadequate protection for the abortion right. *Akron*, 462 U.S. at 466-67, 470-74 (O'Connor, J., dissenting) (upholding second trimester hospitalization, biased counseling, mandatory delay, and physician-only counseling requirements under "undue burden" test); *Thornburgh*, 476 U.S. at 827-33 (O'Connor, J., dissenting) (upholding biased counseling, reporting requirements, degree of care for post-viability abortions, and second physician requirement when fetus is possibly viable under "undue burden" test). *See also Akron*, 462 U.S. at 420 n.1.

Third, if this Court addresses the constitutionality of each state restriction in a piecemeal fashion—as Justice O'Connor did in *Akron* and *Thornburgh*—the test is inadequate for yet another reason. *Roe* mandates that courts ultimately assess

> the degree of burden that the entire regime of abortion regulations places on a woman, . . . [examining] how a given regulation *incrementally* adds to the cumulative burden on the fundamental right. In contrast, the undue burden standard may allow a state to pile on 'reasonable

> regulation' after 'reasonable regulation' until a woman seeking an abortion first had to conquer a multi-faceted obstacle course.

Dellinger and Sperling, *supra* note 51, at 100 (emphasis in original). *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("cumulative effect" of small license tax could crush religious practice when "exacted town by town").

Fourth, the "undue burden" test is likely to result in arbitrary and discriminatory applications by the lower courts. In *Akron* and *Thornburgh*, Justice O'Connor reiterated that heightened judicial scrutiny is reserved for only those instances in which the state has imposed " '*absolute* obstacles or *severe* limitations on the abortion decision,' not whenever a state regulation 'may "inhibit" abortions to some degree.' " *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting) (quoting *Akron*, 462 U.S. at 464 (O'Connor, J., dissenting)) (emphasis added). A burden is not "undue" unless the measure has the effect of " '*substantially* limiting access to the means of effectuating th[e] decision' " to have an abortion. *Akron*, 462 U.S. at 463 (quoting *Carey*, 431 U.S. at 688 (emphasis in original)).[67] Thus lower courts are required to make quantitative and subjective judgments of what constitutes a severe or substantial limitation in order to determine whether the state bears the burden of proving a compelling purpose for the law's enactment.

Even the United States as *amicus curiae* has abandoned the "undue burden" test as flawed. While its *amicus curiae* brief in *Akron*, 462 U.S. 416, urged this Court to adopt the "undue burden" test, its briefs in both *Webster*, 492 U.S. 490, and *Hodgson*, 110 S. Ct. 2926, rejected the standard, finding that the "concept of an undue burden obviously is not self-defining." *See* Brief For the United States As *Amicus Curiae* Supporting Appellants at 22, *Webster*, *supra* (No. 88-605). In *Hodgson*, the United States continued:

67 The court of appeals would also examine whether a particular regulation would have a *severe* or *drastic* impact upon the time, cost, or number of legal providers of abortions. 33a.

> Asking whether a particular measure unduly burdens the right provides no meaningful guidelines for assessing the weight of the competing interests, or for determining how much deference to give to legislative judgments. The only measure of constitutionality would be the courts' own subjective assessment of what is "due" or "undue" in any particular context. In these circumstances, the undue burden analysis would offer "no guide but the Court's own discretion," *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); *see Webster*, 109 S. Ct. 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and would serve only to mask judgments made on the basis of assumptions that would remain unarticulated. In our view, great caution should be exercised in resolving important constitutional controversies under the "undue burden" mantle.

Brief For the United States As *Amicus Curiae* at 21, *Hodgson*, *supra* (Nos. 88-1125, 88-1309).

In the several years since this Court decided *Webster*, state legislators have proposed hundreds of restrictions on abortion[68] which, if enacted, would deter, and in many instances prevent, women from obtaining appropriate health care. Because it offers no guidance to lower courts, the "undue burden" standard will require this Court to determine separately whether each and every one of these numerous provisions imposes an undue burden on a right of reproductive privacy and to analyze that question separately for different classes of women.[69] In that event, fears, expressed by some members of this Court, of encouraging unnecessary litigation and sitting as a super-legislature will be magnified tenfold.

68 *See* National Abortion Rights Action League, *Who Decides? A State-by-State Review of Abortion Rights*, iii (3d ed. 1992), *Abortion and Women's Health* at 39.

69 Restrictions that appear a mere affront or inconvenience to wealthy, educated women acting with the support of their families may impose prohibitive burdens on women with other life circumstances.

Finally, the "undue burden" test will oblige the women already suffering from an act's coercive influence to demonstrate its onerous burdens through costly, time-consuming litigation. Under *Roe*, once plaintiffs prove that a statute will create more than a *de minimis* impact upon a woman's right to choose abortion, the burden shifts to the state to demonstrate that the law furthers a compelling purpose. This allocation is fair, because the state enjoys substantial resources to make its case, resources that women facing unwanted pregnancies are less able to secure. Placing this extraordinary burden upon women facing unwanted pregnancies will be particularly disadvantageous to low-income women, young women, rural women, and battered women, who also are the very citizens least able to defend their interests in the legislative arena.[70]

III. THE RATIONAL BASIS TEST WILL PROVOKE AND SANCTION EXTREME GOVERNMENTAL INTERFERENCE WITH PRIVATE REPRODUCTIVE DECISIONS.

Unfettered deference to legislative action resulting from the adoption of a rational basis standard will sanction and encourage intolerable legislative interference with women's reproductive choices. In *Webster*, a plurality of this Court abandoned *Roe*'s trimester framework on the assumption that modern legislatures would be unlikely to pass legislation "reminiscent of the dark ages." 492 U.S. at 521. However, the state legislative experience during the last several years has belied any notion of legislative moderation.[71]

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70 As commentators recently noted: "[I]t is simply unfair, and unnecessary, to require that a woman actually sacrifice her constitutional liberty *before* she or anyone else can challenge a restriction on her freedom. The Court should not demand an unwanted child, or a woman maimed by an illegal abortion, as proof that strict scrutiny is warranted." Estrich & Sullivan, *supra* note 36, at 136 (emphasis in original).

71 For example, Utah passed a restrictive abortion law that would have subjected doctors to the death penalty for providing illegal abortion. *See Jane L. v. Bangerter*, No. 91-C-345-G (D. Utah filed Apr. 4, 1991). In 1990, Louisiana attempted to revive its pre-*Roe* law subjecting physicians to ten years at hard labor for performing an abortion. *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990). In 1991, after that attempt failed, the Louisiana legislature passed a law banning abortions and contraceptive methods that operate after conception. 1991 La. Sess. Law Serv. 74 (West). In 1990, the territory of Guam passed a law banning virtually all abortions, as well as counseling, encouraging, or advising a woman to obtain an abortion. *Guam Society of Obstetricians & Gynecologists v. Ada*, 766 F. Supp. 1422 (D. Guam 1990), *appeal pending*, No. 90-16706 (9th Cir.). A bill just recently introduced in Rhode Island not only bans abortions except to prevent the immediate death of the pregnant woman, but also prohibits advertisements and referrals about abortion. No. 91-H5310, Rhode Island General Assembly, January Sess. (1991).

While courts must give appropriate deference to the legislative process in the economic arena, *see Ferguson v. Skrupa*, 372 U.S. 726, 727-31 (1963), the framers of the Constitution never intended the political process to resolve questions of individual rights. As this Court has recognized:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638.

Adoption of a rational basis test will also permit state legislatures to impose numerous restrictions adversely affecting women's lives and health and subjecting women of different states to differing standards. A woman's right to choose abortion will vary solely because she does not live in or cannot afford to travel to a state that is more respectful of her constitutional liberty. The result will be an irrational patchwork of state and local laws that "would not conform to the American legal norm of equality." Laurence H. Tribe, *Abortion: The Clash of Absolutes* 75 (1990); *see also* Brief *Amici Curiae* of Certain State Elected Officials; Brief *Amici Curiae* of the City of New York, *et al.*

Moreover, the rational basis test might sanction a wide variety of other incursions on the personal liberty of pregnant women. To further mere rational state interests, could government dictate the lifestyle or working conditions of pregnant women? Could government compel childbirth to further population expansion?[72] Conversely, could it justify forced contraception, abortion, or sterilization to support its rational interests? *See* cases cited *supra* note 32. These intrusive deprivations of personal liberty and autonomy would conflict with this Court's recognition that "the full scope of the liberty guaranteed by the Due Process Clause . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . [and] that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

IV. THE CHALLENGED PROVISIONS ARE INVALID UNDER ANY STANDARD OF REVIEW.

A. Mandatory Husband Notification Violates Rights of Privacy, Marital Integrity, and Equal Protection.

1. In violation of the right of privacy, the Act's husband notification restriction increases the likelihood of violence against women and fails to further any legitimate state interest.

Both the district court and the court of appeals correctly invalidated § 3209's requirement that every married woman first notify her husband that she is about to undergo an abortion. Ever since this Court established that a state may not empower a husband to veto a woman's abortion choice, *Dan-*

72 For example, the pro-natalist policies of the former Ceausescu regime in Romania—including a ban on all forms of contraception and sterilization except in extremely limited circumstances, extra taxation for childless marriages, and monthly birth quotas for factory employees—might be constitutional if rationally related to governmental interests. *See* Charlotte Hord, Henry P. David, France Donnay and Merril Wolf, *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22 Stud. in Fam. Plan. 231, 232 (1991).

forth, 428 U.S. at 67-72, no court has upheld as constitutional a husband notification requirement.[73]

As this Court recognized, a notification statute may give the notified person a veto of the woman's decision, by giving that person the opportunity to prevent the abortion or to penalize the woman severely for exercising her choice. *See Hodgson*, 110 S. Ct. at 2939, 2945 n.36; *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) ("*Bellotti II*"). The record in this case amply demonstrates the onerous burden the husband notification requirement would impose. As the court of appeals explained:

> The district court found that § 3209's notification requirement creates a substantial risk that women who would otherwise have an abortion will be prevented from having one. . . . In those situations where a husband is sufficiently opposed to abortion or sufficiently desirous of having a child that the wife will not voluntarily share the fact of her pregnancy and her intention to abort with him, the clinics' experts testified that coerced notification will predictably result in an effort to prevent the abortion.

66a. Indeed, as the court of appeals observed, the district court found that the number of situations in which "women may reasonably fear dire consequences from notifying their husbands is potentially limitless." 70a; *see also* 257a n.42. "Even if the woman is not deterred from pursuing an abortion, the same arsenal of physical, economic, and psychological abuse is available to the notified husband to penalize the wife for exercising her constitutionally bestowed right." 68a.

The limited exceptions to the husband notification requirement do not relieve women of these severe burdens. Like the "less than effectual" abuse and neglect exception to Minne-

73 *See Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 636 (D.R.I. 1984); *Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D. Ky. 1984); *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976); *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, and remanded*, 659 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982).

sota's two-parent notification statute, *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring); *see also id.* at 2932 n.7, 2939 n.26, the Act's exceptions for sexual assault and bodily injury will leave battered women vulnerable to a range of coercion and abuse. As the district court found and the court of appeals acknowledged, the pattern of random violence inflicted on them ensures that many "battered spouses are psychologically incapacitated from making the assertion required by the statute even when there is ample objective basis for the required fear." 68a-69a; *see also* 197a-198a, 201a. Survivors of marital rape will also be unable to make the exception's required report to law enforcement officials "[g]iven the devastating effect that a report . . . is likely to have on the marital relationship and the economic support provided the wife by the marriage." 70a; *see also* 198a.

Moreover, like the inadequate abuse and neglect exception in *Hodgson*, the spousal sexual assault exception at issue here is, in reality, a means of notifying the husband. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring); *see also id.* at 2932 n.7. To avail herself of the exception, the woman must report the assault "to a law enforcement agency having the requisite jurisdiction," § 3209(b)(3), within 90 days. 18 Pa. Cons. Stat. Ann. § 3128(c) (Supp. 1991). Her husband will be notified of her action once an investigation begins or criminal charges are filed. Further, once the woman reports the marital rape to the police, the information becomes part of the public record and is therefore no longer confidential. *See Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 207 (3d Cir. 1991). The "combination of the abused [woman's] reluctance to report sexual or physical abuse, . . . with the likelihood that invoking the . . . exception for the purpose of avoiding notice will result in notice, makes the . . . exception less than effectual." *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

In addition, even though "physical violence is *not* the only burden reasonably predictable," the harsh exceptions apply only to acts of *physical* violence against the married woman. 69a. As the district court found, the exceptions would not apply where a husband would if notified,

> threaten to (1) [sic] publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive [her] of necessary monies for herself or her children.

194a. A woman protected by a restraining order under the Protection From Abuse Act, 23 Pa. Cons. Stat. Ann. § 6101 et seq. (Supp. 1991), also may be unprotected by the exception. 195a; 199a.[74]

Moreover, this burdensome provision serves no legitimate state interest whatsoever.[75] The district court found that in the absence of a forced notification provision, "[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnanc[ies]." 193a. As this Court recognized in *Hodgson*, 110 S. Ct. at 2945, "[a] statute requiring . . . notification would not further any state interest in those instances." Where women choose not to notify their husbands, the state interests, to the extent they are legitimate at all, would actually be *disserved* by forced notification. As the district court found,

> The record clearly establishes that instead of fostering marital communication and bolstering the state's interest in marital integrity, the exact opposite effect would likely occur. . . . Not only could forced notice hasten

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74 The exception for a woman unable to locate her husband through "diligent effort" is also of doubtful utility. The district court found that, because the Act does not define "diligent effort," the threat of civil and criminal penalties will compel abortion providers to construe the term in a narrow fashion, imposing another layer of delay before the woman may obtain an abortion. 194a.

75 The statute itself enumerates the interests that it purports to further: "the Commonwealth's interest in promoting the integrity of the marital relationship," and "a spouse's interest in having children within marriage and protecting the prenatal life of that spouse's child." § 3209(a).

> the dissolution of a troubled marriage, but it could have potentially disastrous consequences, including subjecting the woman to physical abuse.

262a (citations omitted). *See also* 201a; *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. at 640-41.[76]

Nor can the Commonwealth's purported interest in protecting the husband's "interests in having children within marriage and in protecting the prenatal life of [his] child," § 3209(a), justify the violation of the woman's right of privacy. Although both men and women have a constitutionally protected interest against state interference in their ability to procreate, *see Skinner*, 316 U.S. at 541, and in their children's welfare, *see, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989), neither interest is served by the husband notification requirement. Instead, the statute protects only the husband's "interest" in compelling his wife to bear children for him. That decision, however, must remain with the pregnant woman, "who physically bears the child and who is the more directly and immediately affected by the pregnancy." *Danforth*, 428 U.S. at 71.

2. The Act's husband notification provision unconstitutionally interferes with the protected marital relationship.

This Court has held that the marital relationship is protected by "a right of privacy older than the Bill of Rights" for marriage is regarded as "intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. It " 'has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' " *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (quoting *La Fleur*, 414 U.S. at 639-40); *see Zablocki*, 434 U.S. at 383-85 (1978); *Prince v. Massachusetts*,

76 Dr. Walker testified that forced notification would not guarantee discussion among spouses or improve communications in dysfunctional relationships. J.A. 229. Rather than improving marital integrity in any way, forced notification "will make family communication much more difficult and much more dangerous in [battering] relationships." J.A. 233.

321 U.S. 158, 166 (1944). As Justice Stevens reiterated in *Hodgson*:

> While the State has a legitimate interest in the creation and dissolution of the marriage contract . . . the family has a privacy interest in . . . the intimacies of the marital relationship which is protected by the Constitution against undue state interference . . . . Far more than contraceptives, at issue in *Poe* and *Griswold v. Connecticut*, 381 U.S. 479 (1965), the married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State.

110 S. Ct at 2943, 2944 n.33.

In addition, this Court has "emphasized that the First Amendment protects . . . family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.' " *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 545 (1987) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984)). *See Employment Division, Dep't of Human Resources v. Smith*, 110 S. Ct. 1595, 1601 (1990); *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 18 (1988) (O'Connor, J., concurring).

In the guise of "protecting marital integrity," § 3209 flies in the face of these principles, subjecting marital discussions to state surveillance, censorship, and control. For couples whose relationships do not include discussion of plans regarding childbearing, the state now requires a dialogue which could profoundly alter their most intimate affairs. Even for those who already discuss reproductive choices, an allegation that the wife falsely certified notification would subject the timing, substance, and content of private colloquies to the scrutiny of law enforcement officials who are charged with determining whether the certification is true or whether the couple's discussions are sufficient to meet the vague and undefined level of notification mandated by the Act. This

prospect is every bit as intrusive as Connecticut's birth control statute, which "allow[ed] the State to enquire into, prove and punish married people for the private use of their marital intimacy." *Poe v. Ullman*, 367 U.S. at 548 (Harlan, J., dissenting). *See Griswold*, 381 U.S. at 485-86.

In *Hodgson*, this Court observed that while "full communication among all members of a family" may be desirable,

> such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together . . . . [A] state interest in . . . making the "private realm of family life" conform to some state-designed ideal, is not a legitimate state interest at all.

Hodgson, 110 S. Ct. at 2946 (citations omitted). *Cf. Gilbert v. Minnesota*, 254 U.S 325, 335-36 (1920) (Brandeis, J., dissenting).[77]

3. Section 3209 denies women equal protection of the laws.

Although the interests § 3209 purports to advance are framed in gender-neutral terms, the provision imposes duties on women alone, and confers rights solely on men. The district court found that "[m]any medical and surgical procedures, including . . . sterilization, prostate operations and chemotherapy, affect the capacity of males to have children

77 The court of appeals recognized that § 3209 also violates women's rights to informational privacy by forcing them to disclose intimate details of their lives without a guarantee of confidentiality. 67a-68a. *See Whalen v. Roe*, 429 U.S. 589, 599-605 (1977); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 457-59 (1977); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). Once disclosure of the abortion decision is made, the husband remains free to broadcast this private and intimate information to others. As the court of appeals observed: "When the state forces spousal notification on a wife in a seriously troubled marriage, or even a wife in an untroubled marriage with a husband unalterably opposed to abortion, it compels disclosure of very intimate information with no assurance of confidentiality to someone highly motivated to make a public disclosure." 67a.

within marriage." 199a. Nevertheless, neither this Act nor any other Pennsylvania law requires that a married man notify his wife before undergoing a medical procedure that would affect her "interest in having children within marriage." Married men are free to exercise reproductive choices without interference by, or knowledge of, their wives.

The pattern of sex-differentiated roles in marriage implicit in § 3209 is an old one, not unlike the discredited proposition that the husband is the "head and master" of the marital unit;[78] government enforcement of this pattern violates the commands of the Equal Protection Clause. This Court has made clear that, at the very least, a state cannot constitutionally classify on the basis of gender without demonstrating an "exceedingly persuasive justification" for the classification. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg*, 450 U.S. at 461); *see also Craig v. Boren*, 429 U.S. 190, 204 (1976). Here, where the offending statute also heavily intrudes on basic interests in autonomy, bodily integrity, and health, this Court must undertake the most exacting review of the statutory objectives to determine whether the Commonwealth has a compelling justification for the gender-based discrimination. *See Zablocki*, 434 U.S. 374 (1978) (applying strict scrutiny under Equal Protection Clause to law forbidding marriage); *Skinner*, 316 U.S. 535 (1942) (applying strict scrutiny under Equal Protection Clause to compulsory sterilization law); *cf. Eisenstadt*, 405 U.S. 452 (1972) (invalidating prohibition on contraception under Equal Protection Clause).[79]

78 *See Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (striking down Louisiana statute making husband "head and master" of community property upon marriage). At common law, under the doctrine of coverture, a husband had rights to control his wife's person as well as her property. *See Tinker v. Colwell*, 193 U.S. 473, 481 (1904) ("husband has certain personal and exclusive rights with regard to the person of his wife which are interfered with and invaded by criminal conversation with her . . . [and] the wife is in law incapable of giving any consent to affect the husband's rights").

79 Indeed, in *Thornburgh* this Court emphasized that restrictions on abortion also implicate women's equality. The promise of individual liberty

Section 3209 must fall by application of these principles. As outlined above, the trial court found and the court of appeals confirmed that § 3209 is a "totally irrational vehicle" with which to further marital integrity. 72a, 262a. The Constitution prohibits the state from relying on out-dated gender-based stereotypes that perpetuate women's image as the "weaker sex" or "child rearers." *Califano v. Webster*, 430 U.S. 313, 317 (1977); *see also Orr v. Orr*, 440 U.S. 268, 279 (1979). The Commonwealth's attempt to further asymmetrically the husband's "interest in having children within marriage," embodies precisely the prohibited stereotype that wives should bear children. To the extent that the statute may be based on an assumption that women, unlike men, need spousal guidance in their reproductive choices, it transgresses Justice O'Connor's admonition that "if the statutory objective is to exclude or 'protect' . . . one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Hogan*, 458 U.S. at 725.

B. The Act's Mandatory Delay Will Jeopardize Women's Health and Furthers No Legitimate State Interest.

In *Akron* this Court held that no

> legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor [is] . . . the State's legitimate concern that the woman's decision be informed . . . reasonably served by requiring a 24-hour delay as a matter of course.

Akron, 462 U.S. at 450. Consistent with this holding, the district court confirmed the onerous burdens imposed by the Act's mandatory delay. In particular, the district court found that:

"*extends to women as well as to men* . . . . A woman's right to make that choice freely is fundamental. *Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.*" 476 U.S. at 772 (emphasis added).

(a) The 24-hour waiting period will force every woman seeking an abortion to make two separate trips to the physician.

(b) Because of scheduling complications, the waiting period will "result in delays far in excess of 24 hours"; for most women, the delay will range from forty-eight hours to two weeks.

(c) For many women, the 24-hour delay will significantly increase the cost of obtaining an abortion, including the costs of transportation, overnight lodging, and lost wages.

(d) The requirement of two visits to the provider will subject "many women to the harassment and hostility of anti-abortion protestors . . . ."

(e) The mandatory delay will be especially burdensome for low-income women, young women, women from rural areas, and women—such as battered women—who may have difficulty explaining their whereabouts.

(f) A delay of 24 hours or more will adversely affect the physical and psychological health of some patients, and will increase medical complications.

(g) Where the delay pushes a patient into her second trimester of pregnancy, there will be a substantial increase in the costs of the abortion. Moving the procedure from the early to the middle stages of the second trimester would result in an increased medical risk, including a substantial increase in the risk of death.

171a-174a. In addition, the district court confirmed the lack of any legitimate state interest served by this provision. 174a. Thus, the mandatory delay is unconstitutional under even the least protective standard of review.

The court of appeals did not dispute *any* of the lower court's factual findings. Indeed it acknowledged both the "adverse consequences" of the mandatory delay, 52a-53a, and the Act's failure to "serve any purpose" for women who

have already decided to have an abortion. 55a.[80] Nonetheless, the appeals court concluded that the mandatory delay created no "undue burden" on the right to abortion, because this Court in *Hodgson* upheld a parental notification provision which caused delays of a week or more. *See* 53a (quoting *Hodgson v. Minnesota*, 648 F. Supp. 756, 853 (D. Minn. 1986)).

The flaws in this reasoning are apparent. First, the court of appeals substituted for the record actually developed here a factual finding implicitly adopted in a different case involving completely distinct issues. If undisputed factual findings may be discarded so cavalierly, then the "undue burden" test is truly meaningless. Second, and equally important, in *Hodgson* the state's legitimate interest in allowing parents an opportunity to consult with the young woman was served by the delay. This same interest is not present here. Indeed, in *Hodgson*, Justice O'Connor joined Justice Stevens in expressly distinguishing *Akron* on the ground that no similar interest was served by imposing a 24-hour delay on an adult woman. *See Hodgson*, 110 S. Ct. at 2944-45 n.35.[81]

C. The Act's Biased Counseling Restrictions Violate the Right of Privacy and the First Amendment.

1. Biased patient counseling interferes with the provision of quality medical care and serves no legitimate state interest.

A state may require that a woman give her voluntary and informed consent to the abortion procedure. *Danforth*, 428

80 "If a physician has concluded that any other type of obstetrical or gynecological procedure is medically necessary and has obtained the informed consent of the patient, there is simply no medical reason to delay performance of the procedure any longer." 174a.

81 The court of appeals suggested that the mandatory delay served an interest in ensuring that the woman's decision is "well-considered." 54a. This too, however, is refuted by the undisputed findings of the district court and by this Court in *Akron*, 462 U.S. at 450-51. Only "[a] very small percentage of women are ambivalent concerning whether to have an abortion when they come to a clinic. Arrangements for special counseling sessions are made for women demonstrating any ambivalence about her decision." 171a.

U.S. at 67. But precisely because the validity of an informed consent requirement rests on the state's interest in protecting the health of the pregnant woman, the state may not, under the guise of "informed consent," attempt to intimidate women into continuing their pregnancies by forcing physicians to deliver irrelevant, inaccurate, misleading, or inflammatory information. This is true under any standard of review. *Thornburgh*, 476 U.S. at 759-64. This Court has twice invalidated biased patient counseling requirements virtually identical to those at issue here. *Thornburgh*, 476 U.S. at 759-64; *Akron*, 462 U.S. at 442-45. As this Court recently found:

> Critical to our decisions in *Akron* and *Thornburg[h]* to invalidate a government intrusion into the patient/doctor dialogue was the fact that the laws in both cases required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision.

Rust v. Sullivan, 111 S. Ct. 1759, 1777 (1991) (emphasis in original). Nothing in this record would compel a different result.

As the district court found, the Act's biased counseling provisions "represent a substantial departure from the ordinary medical requirements of informed consent." 170a. Because it requires "the supply of specific information to *all* patients regardless of their specific circumstances, the Act *is contrary to the standard medical practice that informed consent be specifically tailored to the needs of the specific patient.*" 177a (emphasis added). Far from promoting informed consent, the Act will undermine this dialogue because it "may actively discourage the free flow of information . . . by relieving any physician 'who complies with the provisions' of section 3205 from civil liability for failure to obtain informed consent." 177a.

For many women, some of the specific information mandated by the Act will be irrelevant, misleading, inaccurate, or inflammatory. For example, the Act requires a disclosure of medical risks of carrying a pregnancy to term. If a woman needs an abortion because she is carrying an anencephalic fetus, *no legitimate purpose is served* by detailing her risk of death from preeclampsia or informing her that she may require a cesarean section at the time of delivery. 178a. Similarly, "[i]nforming women of the availability of medical assistance benefits or paternal support for the child has no legitimate medical justification. The information may mislead or confuse the patient, and, in the vast majority of the cases, is plainly inappropriate given the circumstances of the individual patient." 179a.[82]

Similarly, requiring physicians to offer to their patients state-prepared materials describing the fetus and listing agencies that provide alternatives to abortion is simply "an attempt by the Commonwealth to alter a woman's decision after she has determined that an abortion is in her best interest." 179a. This mandated information "will create the impression in women that the Commonwealth disapproves of the woman's decision," and "will create undesirable and unnecessary anxiety, anguish and fear." 178a-179a.

In short, "[u]nder the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and thus, *it advances no legitimate state interest.*" *Thornburgh*, 476 U.S. at 763 (emphasis added). The provisions are therefore unconstitutional under any standard of review.

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82 "Advising a patient of the general availability of such benefits or payments may cause a woman to rely upon those statements and elect against an abortion only to discover that the benefits or payments were unavailable or insufficient." 179a-180a. For example, in 1988 only one-quarter of child support payments orders issued by Pennsylvania state courts were actually enforced. Children's Defense Fund, *The State of America's Children 1991* 152 (1991). Moreover, child support payments may be wholly insufficient to allow any meaningful economic support for a woman to raise a child. Ms. Dillon's case exemplifies this problem. After waiting 18 months to obtain a child support order, the order was only $125 per week, clearly insufficient to provide for her four children. J.A. 386.

Moreover, the Act's requirement that only physicians deliver certain portions of the state-mandated information will increase the costs of the procedure, require extensive changes in the operating schedules of physicians and clinics, and ultimately reduce the availability of abortion services. 175a-176a. Yet, the district court found that non-physician counselors by virtue of their training and experience, are fully capable of providing information, discussing the alternatives to abortion, and securing the patient's informed consent. 175a. Indeed, "[i]n many instances, trained counselors . . . are more understanding than physicians and have more time to spend with patients." 175a. Thus, the "state's interest in ensuring that a woman's consent to an abortion procedure is informed and unpressured *is in no way furthered* by mandating the identity of the person that must obtain the informed consent." 176a (emphasis added). As this Court has held, the "critical factor is whether [the woman] obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Akron*, 462 U.S. at 448. *See also Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2983 (1990).

2. In violation of the First Amendment, the biased counseling provisions force the physician to communicate the state's ideology.

The First Amendment's guarantee "includes both the right to speak freely and the right to refrain from speaking at all"; it protects "the right of individuals . . . to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 714, 715 (citations omitted).[83] Even when a speaker is free to disavow the government's message, it is a violation of

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83 *See Barnette*, 319 U.S. at 642 (no official may "prescribe what shall be orthodox" in matters of opinion or "force citizens to confess by word or act their faith therein"); *see also Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1957 (1991); *id.* at 1960 (opinion of Blackmun, J.); *id.* at 1970 (Marshall, J., concurring in part and dissenting in part); *id.* at 1978 (Scalia, J., concurring in part and dissenting in part); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988); *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 10-11 (1986) (plurality opinion).

the First Amendment to "require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. Co.*, 475 U.S. at 16. When the government compels an individual to be an instrument for the dissemination of "an ideological point of view he finds unacceptable,"[84] *Wooley*, 430 U.S. at 715, the government imposes "a content-based regulation of speech." *Riley*, 487 U.S. at 795. Thus the statute "is subject to exacting First Amendment scrutiny" and may survive only if it is "narrowly tailored" to promote a compelling governmental interest. *Id.* at 798.[85]

Section 3205 cannot survive this test. Under duress of law, physicians and counselors must recite a litany of government-mandated information, as well as offer information prepared and provided by the Commonwealth. These requirements "will undermine the physician's or counselor's ability to counsel a patient according to her individual needs, and will force the physician or counselor to act in a manner inconsistent with their [sic] professional judgment." 179a. Thus, no less than the plaintiffs in *Wooley* and *Riley* and the appellants in *Pacific Gas & Elec. Co.*, the Pennsylvania physicians find themselves forced to convey the state's message at the cost of violating their own conscientious beliefs and professional commitments.[86]

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84 Justice O'Connor recognized that "[e]ven the requirement that women . . . be informed of the availability of those materials, and furnished with them on request, may create some possibility that the physician or counselor is being required to 'communicate [the State's] ideology.' " *Thornburgh*, 476 U.S. at 830 (citing with approval *Akron*, 462 U.S. at 472 n.16, and *Wooley*, 430 U.S. 705).

85 This doctrine is not confined to speech with an ideological viewpoint. *Riley*, 487 U.S. at 797-98. In *Riley*, this Court observed that compelling statements of "fact" regarding the percentage of charitable funds that went to overhead was no more permissible than compelling statements of "opinion": "either form of compulsion burdens protected speech." *Id.* In any case, the compelled speech at issue here clearly conveys an ideological message. *Cf. Bigelow v. Virginia*, 421 U.S. 809, 822 (1975).

86 These requirements also violate the First Amendment rights of the woman who must listen to the state's litany in order to obtain an abortion. "While [the government] clearly has a right to express [its] views to those who wish to listen, [it] has no right to force its message upon an audience incapable of declining to receive it." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring).

The Commonwealth's asserted interest in assuring that the woman's consent is informed and voluntary cannot validate these infringements. As discussed above, although a state may require that a woman "give what is truly a voluntary and informed consent," *Thornburgh*, 476 U.S. at 760, "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Akron*, 462 U.S. at 443. *See also Thornburgh*, 476 U.S. at 762. The principles of *Wooley* and *Barnette*, which establish the "individual's First Amendment right to avoid becoming the courier for [the government's] message," *Wooley*, 430 U.S. at 717, thus render unconstitutional the biased counseling provisions of § 3205.

D. The Act's "Informed" Parental Consent Restriction Unduly Burdens the Right of Privacy and Forces Family Life to Conform to a State-Designed Ideal.

A state may promote parental involvement in a young woman's abortion decision when necessary to protect its "interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely," *Hodgson*, 110 S. Ct. at 2942 (opinion of Stevens, J.), and to "protect[ ] a parent's interest in shaping a child's values and lifestyle . . . ." *Id.* at 2946. However, in promoting parental involvement, the state is limited by "the constitutional protection against unjustified state intrusion . . . [which] extends to pregnant minors as well as adult women." *Hodgson*, 110 S. Ct. at 2937 (opinion of Stevens, J.). Consequently, the state may not " 'unduly burden' the fundamental right" to abortion. *Id.* at 2949 (O'Connor, J., concurring) (quoting *Akron*, 462 U.S. at 453).[87]

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87 In contrast to the strict scrutiny standard for adult women, the district court correctly recognized that the "undue burden" standard was appropriate to judge restrictions affecting young women. 248a.

Pennsylvania's "informed" parental consent statute goes far beyond the parental notification and consent statutes at issue in *Hodgson*, 110 S. Ct. 2926 (1990), and *Bellotti II*, 443 U.S. 622 (1979). As the district court held, "informed consent" is a term of art, and

> personal contact between the patient and the person rendering the informed consent is essential. The physician's or counselor's observation of the person's demeanor and reactions . . . is essential to permit the physician or counselor to determine whether the patient is competent to give informed consent and whether the patient fully understood the information . . . .

170a. Thus, consistent with the "standard medical principles of informed consent," the district court found that "informed" parental consent under the Act will require in-person consultation with the parent. 182a-183a, 248a.

By mandating face-to-face counseling for parents, the Act undermines, rather than promotes, the state's interests in protecting parental involvement and the well-being of young women. There can be no dispute that by increasing the delay, costs, and medical risks of abortion, the "informed" parental consent requirement will harm young women. As the district court found, the requirement of parental counseling could "cause delays of several days or possibly weeks." 183a; *see also* 182a. Coupled with other requirements of the Act, § 3206 "will create layers of obstacles which could unduly burden a minor woman's ability to get an abortion . . . . In some cases, the provisions may act in such a way as to deprive her of her right to have an abortion." 186a; *see also* 184a.[88]

The statute's "informed" parental consent requirement will have a particularly irrational and perverse impact on the parents of pregnant young women. As the district court found, even when prepared to consent, some parents will be unable to come to the clinic for several days because of work schedules or family obligations, or because they cannot afford the additional cost of travel, lost wages, and child care expenses. 185a-186a. The requirement presents so insurmountable an obstacle that even parents who have participated in, support, and consent to their daughter's abortion, may be unable to comply with the law. 185a. *See also Planned Parenthood Ass'n v. Harris*, 670 F. Supp. 971, 987-88 (N.D. Ga. 1987).

88 Unlike the regulation of any other medical procedure, the Act requires a physician performing an abortion to evaluate the competency and obtain the informed consent of two separate individuals, with the irrational but inevitable result that if the parent is not competent to give informed consent, the physician cannot perform the abortion, even though a parent has been notified and is involved, and the young woman is fully capable of giving her own informed consent.

Where the parents choose to "shap[e] [their] child's values and lifestyle," *Hodgson*, 110 S. Ct. at 2946, by permitting her to exercise independent judgment, the Pennsylvania statute perversely forces the parents to act contrary to their own beliefs, "slic[ing] deeply into the family itself." *Hodgson*, 110 S. Ct. at 2946 (quoting *Moore*, 431 U.S. at 498). As the district court explained, "The parent may be reluctant to explain his or her absence from work, or may not wish to be seen entering an abortion clinic." 249a. In some cases, "a parent may refuse to accompany their daughter to the facility even though he or she has agreed to consent to the daughter's abortion." 185a. Thus, rather than protect parental rights, the statute merely "substitut[es] its conception of family life for the family's own view." *Hodgson*, 110 S. Ct. at 2946. Such an asserted "state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, *is not a legitimate state interest at all.*" *Id.* (emphasis added).

E. The Act's Public Disclosure and Reporting Requirements Burden Women's Right of Privacy and Fail to Further Legitimate State Interests.

The Act's reporting and disclosure requirements also burden the right to abortion without serving any legitimate state interest. First, §§ 3207(b) and 3214(f) require every facility that performs abortions to file with the Commonwealth quarterly reports of the total number of abortions performed. The reports of facilities that received state funds within the year prior to filing are available to the public for inspection and copying.

As the district court found, most abortion providers have suffered a wave of extreme anti-abortion violence and harassment. 211a-213a. The public's access to the quarterly reports gives the clinics reasonable basis to fear that this harassment and violence will increase, 213a, and will cause some providers to forego state funds for both abortion and other health services. "The likely result will be that indigent patients who have been the victims of rape or incest or who suffer from a life-threatening condition will find it difficult, if not impossible . . . to obtain abortion services." 213a-214a. Moreover, for physicians who now perform abortions only several times a year, public disclosure and its attendant threat of harassment is enough to deter the performance of abortion altogether.[89]

Recognizing that the disclosure provisions further no legitimate or compelling interests in health, the only interest asserted by the Commonwealth to support the requirement is the public's right to know how its funds are spent. 83a. The reports do not, however, accomplish this objective because they include no information about the nature or amount of state funds that trigger public disclosure under the Act.[90] Rather, the requirements merely enhance the ability of abortion opponents to intimidate abortion providers. The provision must therefore be invalidated. *Thornburgh*, 476 U.S. at 765-66.[91]

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89 The harassment of physicians is expected to increase in light of the recent strategic announcement by the anti-choice organization Operation Rescue that it plans to drive doctors who perform abortions out of business. Mimi Hall, *Abortion Foes Target Doctors*, USA Today, Feb. 5, 1992, at 3A (quoting Randall Terry) ("We're going to shame [doctors], humiliate them, embarrass them, disgrace them and expose them until they quit"). *See also* Christine Spokar, *Abortion Foes' Mood Defiant*, Washington Post, Jan. 21, 1992, at B1.

90 Records of state appropriations and expenditures are maintained and generally available, however, under Pennsylvania's Right-to-Know Law, 65 Pa. Cons. Stat. Ann. §§ 66.1-66.4 (Supp. 1991). *See* 210a.

91 By coercing providers into public disclosure as a condition of receiving state aid, the Act also improperly conditions the receipt of a public benefit on the surrender of a constitutionally protected right. This Court has explicitly applied the unconstitutional conditions doctrine to the right to choose abortion. *See Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986) (state funds may not be conditioned on an organization's relinquishment of privately funded abortion-related activities). *See also Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980).

In addition to placing an impermissible burden on the right to abortion, the district court also found that the requirement that abortion providers report the name of the referring physician "serves no legitimate scientific purpose." 219a. It "does not add to the pool of scientific knowledge concerning abortion. Nor is it reasonably related to the Commonwealth's interest in promoting maternal health." 272a.[92] Consequently, the provision is invalid.

Even though these reports are to be confidentially maintained, referring physicians "are extremely protective of their anonymity because of fears (often based upon past experience) that any kind of documentation or record-keeping connecting them with any phase of the abortion decision will have adverse effects on their medical practices and patients or their ability to reside peacefully in their communities." 219a.[93] By reducing the number of physicians willing to make referrals for abortion, the Act's reporting requirement unconstitutionally burdens the right to abortion. 272a.[94]

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92 As the district court pointed out, although the referring physician may provide some of the state-mandated information, the abortion provider must review the information with the patient, "regardless of what the referring physician may or may not have done . . . . Therefore, the performing physician or abortion facility will have all information the Commonwealth might seek . . . at their disposal." 272a-273a.

93 The district court found specific instances where doctors would stop referring patients for abortions if their names were reported as required by the Act. 220a, 221a.

94 Similarly, the district court found that the Act's requirement that physicians report the basis for their medical judgments concerning viability,

F. This Court Must Enjoin Enforcement of the Act's Medical Emergency Exception to the Extent that Compliance Would Pose a Threat to the Life or Health of Women or Must Find the Provision Unconstitutional.

Section 3203 provides an exception to several of the Act's provisions in the case of a "medical emergency." As the district court found, "[w]ithout question, the definition of medical emergency is more restrictive than any other as applied in medical situations." 235a-236a. The Act's definition is "contrary to generally accepted standards of emergency medical care, and interferes with a physician's ability to act in accordance with his best medical judgment." 157a.[95] As a result, compliance with the Act could "ultimately jeopardize the health of the pregnant woman." 162a.

The court of appeals agreed that it was bound by this Court's holding in *Thornburgh*, 476 U.S. at 770-71, that "any abortion regulation which might delay or prevent an abortion must contain a medical emergency exception," 36a, and that a valid medical emergency exception would necessarily include the conditions of inevitable abortion, premature ruptured membrane, and preeclampsia. 37a. Nevertheless, to assure that compliance with Pennsylvania law would "not in any way pose a significant threat to the life or health of a woman," the court of appeals construed the Act to include these conditions within its narrow definition. 40a.

The court of appeals correctly intended to remove the constitutional infirmity in § 3203. Its effort to do so, however, failed for two reasons. First, the court of appeals' holding that the medical emergency definition need only protect

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the existence of a medical emergency, and the determination of gestational age would "serve no useful scientific purpose," and would interfere with the physician's exercise of medical judgment. 222a, 274a (citation omitted).

95 The district court found that the Act's definition of medical emergency "departs from the normal medical definition of an emergency and is inconsistent with that contained in Pennsylvania's Emergency Medical Services Act." 155a. "No other law infringes so heavily on a physician's discretion to decide when he or she is faced with a medical emergency as the provisions of the Act." 156a.

women from "significant" threats to their life or health, is inconsistent with this Court's holding in *Thornburgh*. It unfortunately fails to ensure that a woman's health remains the physician's paramount consideration. *Thornburgh*, 476 U.S. at 768-69.[96]

Second, the interpretation runs afoul of the principle that a federal court may not "rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). A federal court's interpretation of state legislation is "not binding on state courts and may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless." *Moore v. Sims*, 442 U.S. 415, 428 (1979). *See also Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988) (federal courts "will not write nonbinding limits into a silent state statute").[97] Therefore, physicians cannot rely on the court of appeals' narrowing construction to insulate them from criminal prosecution, and must sacrifice their patient's health to avoid the threat of criminal penalties.

To solve these dilemmas, this Court must either find the provision unconstitutional or enjoin enforcement of the definition to the extent that compliance with its requirement would in any way pose a threat to the life or health of a woman. With an injunction in place, a physician could, without risk of criminal prosecution, treat the medical emergency exception as inclusive of those conditions, like inevitable abortion, premature ruptured membrane, and preeclampsia, which threaten a pregnant woman's life or health.

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96 The saving construction also fails to include other complications of pregnancy similar to those recognized by the district court. *See* Brief *Amici Curiae* of American College of Obstetricians & Gynecologists, *et al.*

97 The court of appeals cited neither legislative history nor decisional law as an authoritative basis for its construction. Nor could the court of appeals rely on the interpretation offered by the Attorney General. As this Court held in *Virginia v. American Booksellers*, 484 U.S. at 395, because "the Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authoritative."

CONCLUSION

For the reasons set forth above, petitioners ask that this Court reaffirm the strict scrutiny standard of *Roe v. Wade*. Any other decision by this Court would forsake the promise of liberty and equality that has safeguarded the lives and health of American women for almost two decades. The judgment of the court of appeals finding unconstitutional the Act's husband notification provision in § 3209 must be affirmed and the judgment finding constitutional §§ 3203 (definition of medical emergency), 3205, 3206, 3207(b), 3208, 3214(a) and (f) must be reversed.

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